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No. 96-230

IN THE

Supreme Court Of The United States

OCTOBER TERM 1996

HANCOCK ELECTRONICS CORPORATION,

Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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1. WMATA makes numerous allegations in its Statement of Facts that are irrelevant to the issues in this case, unsupported by any record evidence, and inappropriate in the context of a motion to dismiss. Among them are the claims that "safety testing for computer programming is performed by what is know[n] as a Failure Modes and Effects Analysis ("FMEA") test," Opp. 3, and that "WMATA needed to have FMEA tests performed on Hancock's braking system software." *Id.*

These assertions should be ignored by the Court. Instead, on a motion to dismiss, the relevant points are the ones alleged in the complaint: (1) A FMEA was not required, contemplated, or mentioned in the contract between Hancock and WMATA, (2) Hancock was excluded from a subsequent contract between WMATA and a third party, Battelle Corporation ("Battelle"), to perform a FMEA on Hancock's brakes, (3) WMATA was warned that by excluding Hancock from the FMEA contract, WMATA would not have access to Hancock's proprietary data to perform the FMEA, and (4) WMATA's attempt to get that data from Hancock by ruse and deception was a material breach of, and cardinal change to, Hancock's contract. App. 6-10. *See also* Pet. App. 7a-8a (according to district court, if WMATA wanted Hancock's data for the FMEA, it should have so provided in Hancock's contract).

2. WMATA argues that the doctrine of constructive termination for convenience applies to "any breach of contract by the government." Opp. 2, 9. Accepting this argument would completely undermine the bedrock government contracts doctrine of "cardinal change."

Under government contracts such as the one at issue here, the government may unilaterally order changes in the contractor's performance as long as those changes are within the general scope of the contract. Any additional costs imposed on the contractor are to be negotiated using procedures set forth in the disputes clause of the contract. Yet any changes ordered by the government that are *not* within the scope of the contract, and which fundamentally alter the nature of the contractor's undertaking, *cannot* be resolved using the disputes clause procedures. In those cases, and this one too, the contractor's remedy is to suspend his performance under the contract and sue in court. *Rohr Industries, Inc. v. WMATA*, 720 F.2d 1319, 1322-23 (D.C. Cir. 1983). These principles are universally recognized. *See United States v. Utah Construction and Mining Co.*, 384 U.S. 394, 412

(1966); *In re Boston Shipyard Corp.*, 886 F.2d 451, 456-57 (1st Cir. 1989); *Ginsberg v. United States*, 707 F.2d 91, 93 n.1 (4th Cir. 1983); *Bethlehem Steel Corp. v. Grace Line, Inc.*, 416 F.2d 1096, 1101 (D.C. Cir. 1969); *Crown Coat Front Co. v. United States*, 395 F.2d 160, 161 (2d Cir.), *cert. denied*, 393 U.S. 853 (1968).[1]

Where the government orders a cardinal change, the contractor refuses to comply, and instead sues on the contract, the doctrine of constructive termination for convenience cannot be invoked by the government to avoid the consequences of its breach. If the government does not attempt to terminate the contract at all, it cannot later argue that such a termination was really for the convenience of the government. *See, e.g., College Point Boat Corp. v. United States*, 267 U.S. 12, 15-16 (1925); *Maxima Corp. v. United States*, 847 F.2d 1549, 1553 (Fed. Cir. 1988); *Torncello v. United States*, 681 F.2d 756, 759 (Ct. Cl. 1982); *Sanders Associates, Inc. v. United States*, 423 F.2d 291, 295-96 (Ct. Cl. 1970); *G.C. Casebolt Co. v. United States*, 421 F.2d 710, 712 (Ct. Cl. 1970). The question here is not, as WMATA argues, whether an "exception" to the doctrine of constructive termination for convenience applies to cases involving cardinal change. Opp. 10-11. The doctrine does not apply at all absent action by the government to terminate the contractor's performance.

Once the contractor has sued on the contract, moreover, there is no longer any contract for the government to terminate, expressly or constructively, for convenience or otherwise. *See, e.g., Northern Helex Co. v. United States*, 524 F.2d 707, 715-16 (Ct. Cl. 1975), *cert. denied*, 429 U.S. 866 (1976); *William Green Construction Co. v. United States*, 477 F.2d

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[1] Contrary to WMATA's argument, Opp. 11, termination for convenience provisions are included in virtually every government contract today, either expressly or implicitly as a matter of law. *See G.L. Christian & Associates v. United States*, 312 F.2d 418, 424-27 (Ct. Cl.), *cert. denied*, 375 U.S. 954 (1963).

930, 936 (Ct. Cl. 1973), *cert. denied*, 417 U.S. 909 (1974). Any *post hoc* attempt to argue that the contract had actually been terminated by the government is therefore insufficient to deprive the contractor of the breach remedy. *See generally* C. Vacketta & T. Wheeler, *A Government Contractor's Right To Abandon Performance*, 65 Geo. L.J. 27, 46-47 (1976).[2]

3. WMATA argues that the court of appeals was correct in ruling on the issue of cardinal change on WMATA's motion to dismiss because Hancock's complaint "affirms that all software documentation necessary to operation of the braking systems was complete and in hand" at the time the qualification tests were to have been performed. Opp. 15. The argument fails because it misperceives the doctrine of cardinal change, in which the *nature and quality* of the changes ordered, not merely the amount of extra effort involved, determines whether a change is within or outside the scope of a contract. *See, e.g., In re Boston Shipyard Corp.*, 886 F.2d at 456-57; *Edward A. Marden Corp. v. United States*, 442 F.2d 364, 369 (Ct. Cl. 1971). The Fourth Circuit too ignored this critical distinction. Pet. App. 5a-6a.

The argument also fails because it mischaracterizes Hancock's complaint. As made clear there, the claim in this case does *not* arise out of a simple request by WMATA to review the proprietary data that Hancock had brought with it to the qualification tests, so WMATA could evaluate the operation of Hancock's brakes at that time. It arises out of WMATA's demand that Hancock surrender that data to WMATA for other unspecified -- and unlimited -- purposes, which were later revealed to include disclosure to Battelle so it could perform a FMEA on Hancock's brakes. App. 8-10. Hancock's

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[2] WMATA incorrectly states that it notified Hancock that its contract was being terminated for default on May 15, 1995, four days after Hancock stopped its performance on the contract and sued WMATA in federal court. Opp. 5. In fact, WMATA did not inform Hancock of its purported "default" until June 16, 1995. Supp. App. 52-53.

claim also arises out of WMATA's demand that, if Battelle wanted more proprietary data from Hancock for the FMEA, Hancock would have to generate it, and then give it up too. App. 9-10; *see also* Supp. App. 65-66.

As the district court found in its original ruling, these allegations were sufficient to state a claim of cardinal change, and Hancock should have been permitted the federal forum to fully develop facts to support it. Pet. App. 8a.

CONCLUSION

For all the foregoing reasons, Hancock Electronics Corporation respectfully requests that its Petition for Writ of Certiorari be granted.

Respectfully submitted,

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